Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KELSEY-HAYES COMPANY,

Cross-Petitioner,

v.

JOSEPH GOLDEN, ANGELO DEITOS, EDWARD JONES, LUTHER PALMER, CAROLINE FORYS, JOSEPHINE THOMAS, ARTHUR SALLIS, THELMA SONGER, JOHN W. GALLOWAY and ROGER FARRAR, on behalf of themselves and a class of persons similarly situated,

Cross-Respondents.

On Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Do the Employee Retirement Income Security Act of 1974 ("ERISA"), and principles derived from it, apply to a welfare benefit plan established pursuant to collective bargaining agreements?

II. Does ERISA supersede inconsistent federal common law under the Labor Management Relations Act?

III. Can welfare benefits vest under an ERISA-regulated welfare benefit plan, whose terms do not provide for vesting of welfare benefits?

IV. Can the district court presume or "infer" that health benefits vest upon an employee's retirement, based on his status as a retiree, and substitute that inference for benefit plan language that does not provide for vesting of welfare benefits?

PARTIES BELOW

Kelsey-Hayes Company and Hayes Wheels International, Inc. were Defendants in the District Court, and Respondents to the petition for writ of mandamus in the Court of Appeals. Kelsey-Hayes Company was the Appellant in the Court of Appeals and is Cross-Petitioner here; Hayes Wheels International, Inc. is not. Kelsey-Hayes Company is a wholly-owned subsidiary of Varity Corporation, a publicly traded corporation, and is now known as "VarityKelsey-Hayes Company." Hayes Wheels International, Inc. is a publicly-traded corporation. It has agreed to merge with MWC Holdings, Inc., a publicly traded corporation. Neither Kelsey-Hayes nor Hayes Wheels has any non-wholly-owned subsidiary.

Cross-Respondents Joseph Golden, Angelo Deitos, Edward Jones, Luther Palmer, Caroline Forys, Josephine Thomas, Arthur Sallis, Thelma Songer, John W. Galloway and Roger Farrar were Plaintiffs in the District Court, and Appellees and Petitioners for a writ of mandamus in the Court of Appeals. Ida Thomason and John Hoyle were Plaintiffs in the District Court below, but are not parties in this Court; Thomason was dismissed and Hoyle is dead. Stephen Santangelo is a plaintiff in the District Court, but is not a party in this Court.

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KELSEY-HAYES COMPANY,

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Kelsey-Hayes Company hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, filed on January 18, 1996, affirming a preliminary injunction against it in *Golden v. Kelsey-Hayes Co.*, 6th Cir. No. 94-1403, and denying a writ of mandamus in *In re Joseph Golden*, 6th Cir. No. 95-1474. This cross-petition is conditional: Cross-Petitioner requests it be granted only if the Court grants the petition in *Golden v. Kelsey-Hayes Co.*, No. 95-1674.

OPINIONS BELOW

The Court of Appeal's opinion is reported at 73 F.3d 648 (6th Cir. 1996), and is reproduced at pages 1a-34a of the Appendix to the certiorari petition (hereafter "Pet. App."). The Order denying hearing *en banc*, entered February 1, 1996, is unpublished and is reproduced at page 1a of the Appendix to this Cross-Petition (hereinafter "C-Pet. App."). The District Court Order granting the Plaintiffs' motion for preliminary injunction is reported at 845 F. Supp. 410 (E.D. Mich. 1994). (Pet. App. 53a-66a)

JURISDICTIONAL STATEMENT

The Court of Appeals possessed jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). The Court entered its opinion on January 18, 1996, and no petition for panel rehearing was filed. (Pet App. 1a) The first petition for writ of certiorari was filed in this Court on April 17, 1996. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1); Cross-Petitioner here relies on Supreme Court Rule 12.5. Although the Court of Appeals issued its mandate in the injunction appeal on February 9, 1996, this Court may consider the issues here raised. *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 467 (1947).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), provides:

> **§ 185. Suits by and against labor organizations**
>
> **(a) Venue, amount, and citizenship**
>
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this

chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 4(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1003(a), provides:

> Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—
>
> (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or
>
> (3) by both.

Section 514 of ERISA, 29 U.S.C. § 1144, provides in relevant part:

> **§ 1144. Other Laws**
>
> **(a) Supersedure; effective date**
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.
>
> * * *
>
> **(c) Definitions**
>
> For purposes of this section:
>
> (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United

States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

* * *

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) or any rule or regulation issued under any such law.

STATEMENT OF THE CASE

Plaintiff UAW retirees and surviving spouses below sought an injunction requiring Kelsey-Hayes to provide comprehensive health benefits coverage at no cost to them for the rest of their lives. The suit was triggered by announced modifications (not termination) of their health benefits to include premium contributions; increased copayments and annual deductibles; changes in the manner coverage was coordinated with Medicare; and a lifetime benefit cap of $500,000 per beneficiary. Plaintiffs' Complaint articulated three theories. Count I alleged violations of expired collective bargaining agreements ("CBAs") between Kelsey-Hayes and the UAW and UAW Locals at both current and sold facilities, pursuant to Section 301(a) of the LMRA. Count II sought to recover benefits and to clarify rights, pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B); and Count III alleged estoppel. (R.1: Complaint 7-13)

Plaintiffs filed the Complaint on November 12, 1993 (R.1), and a Motion for Preliminary Injunction on December 23, 1993 (R.4).[1] Due to agreements reached at the Detroit and Romulus facilities, Plaintiffs sought a preliminary injunction only as to the facilities sold in 1987: Heintz, SPECO and Gunite.

The Heintz and SPECO CBAs possessed a structure similar to that covering Detroit and Romulus: the CBA provided that there will be an insurance program, to be set out in a separate insurance agreement, which is then incorporated by reference. The "Insurance Supplemental Agreement" consisted of a short insurance agreement, which in turn incorporates an insurance program which spells out the benefits provided, eligibility criteria, and the details of the program. (R.5: Thomas Aff't; R.6: Hess Aff't Exs. D-H) The insurance programs contain similar (not identical) provisions. Both the Insurance Supplemental Agreements at Heintz and at SPECO provided in a "duration of agreement" clause that: "This Agreement and Program as modified and supplemented by this Agreement shall continue in effect until the termination of the Collective Bargaining Agreement of which this is a part." (C-Pet. App. 3a, 7a)

At Gunite there was no insurance supplement; the benefits and eligibility criteria were spelled out in the CBA itself, in different and simpler language than at Heintz and SPECO. The Gunite CBA, like the CBAs at Heintz and SPECO, did contain a provision entitled "Duration",

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[1] In support of the motion, Plaintiffs submitted: the last collective bargaining agreement for each plant, the last applicable insurance supplement for Heintz and SPECO (there was no insurance supplement at Gunite), a 1984 summary plan description for Gunite, and a 1977 summary plan description for Heintz. (R.6)

which defined the fixed term of the Agreement and the date upon which it terminated. (C-Pet. App. 3a, 6a, 10a)

Nothing in any of the CBAs or Insurance Supplemental Agreements provided for vesting or lifetime duration or continuation of health benefits beyond the term of the contract. The Insurance Supplemental Agreements only provided that the same health care coverage an active employee has at retirement "shall be continued" (SPECO) or "shall be continued thereafter" (Heintz). (R.6: Hess Aff't Exs. F at 87, H at 43) The Gunite CBA contains even less: *no* continuation or eligibility provision—just that "The Company will pay the full cost" of medical coverage of current and future pensioners. There is no provision anywhere for vesting, or for continuation of benefits beyond contract expiration. Each CBA contained an integration or "zipper" clause, terminating all prior agreements and providing that the CBA (and Insurance Supplemental Agreements) comprised the entire agreement between the parties. (R.6: Hess Aff't Ex. A at 67, Ex. D at 59, Ex. G at 69)

The district court issued its decision granting a preliminary injunction on March 14, 1994. (Pet. App. 53a) As clarified, the order required Kelsey-Hayes to reinstate health care benefits for all hourly retirees who retired from the Heintz, SPECO and Gunite plants, and their surviving spouses and dependents, at the levels in effect when Kelsey-Hayes sold the plants in 1987. (R.19: Op. 16; R.27: Op. 3)

The district court defined the issue as whether the health benefits provided in the CBAs had vested for the lifetime of the retirees, so as to preclude unilateral modification. The court concluded that Plaintiffs had demonstrated a "strong likelihood of success on the merits of

their claim for lifetime retiree health care benefits" (Pet. App. 62a), in reliance on *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), and its progeny. The court noted that "[t]he most important holding of the *Yard-Man* decision is a recognition of an inference of interminable [retiree insurance] benefits absent express language to the contrary" in the CBA. (Pet. App. 57a) The court held the *Yard-Man* "inference" outweighed both the durational clauses in the CBAs, and the specific duration clauses in the Insurance Supplemental Agreements. (Pet. App. 60-61a) Apart from the *Yard-Man* "inference" and that the CBAs tied eligibility for health benefits to the status of being pension-eligible, the only other evidence relied upon by the court was entirely extrinsic to the CBAs—summary plan descriptions ("SPDs"). (C-Pet. App. 11a-12a) (Pet. App. 62)

Kelsey Hayes filed a timely notice of appeal to the Sixth Circuit, which affirmed the injunction. (R.24) The Court rejected Kelsey-Hayes' argument that the *Yard-Man* "inference", by interpolating vesting language into silent welfare benefit plan documents (the CBAs), was inconsistent with ERISA and this Court's post-*Yard-Man* jurisprudence. The Sixth Circuit expressly reaffirmed both the validity of *Yard-Man*, and the substantial likelihood of success finding. Although the Court stated that *Yard-Man* "does not shift the burden of proof to the employer, nor does it require specific anti-vesting language before a court can find the parties did not intend benefits to vest", it upheld vesting when the CBA's were silent. Although the Court stated that *Yard-Man* creates "no legal presumption based on the status of retired employees", it upheld the lower court's reasoning that vesting was evidenced by the CBAs' linkage of welfare benefit eligibility to pensioner status. (Pet. App. 12a)

REASONS FOR GRANTING THE WRIT

Employers are normally free to modify ERISA-regulated welfare benefit plans at will. When collective bargaining agreements expire, they expire. But since 1983, the Sixth Circuit has drawn an "inference" or presumption in cases involving health benefits provided to union retirees: that health benefits vest upon retirement, without regard to the terms of the benefit plan.

The Court of Appeals erred when it:

- held that ERISA principles do not apply to this case, an action to recover benefits under the terms of an ERISA-regulated welfare benefit plan;
- disregarded controlling Supreme Court precedent in favor of a contrary "inference" derived from its decision in *Yard-Man*; and
- "inferred" that health benefits vest on retirement, based solely on the plaintiffs' "status" as retirees, and not on any term of the benefit plan documents.

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR PRONOUNCEMENTS.

a. This is an action to recover benefits allegedly due under the terms of a welfare benefit plan, and to clarify rights to future benefits under the terms of the plan, brought under § 502(a)(1)(B) of ERISA and § 301(a) of the L.M.R.A. (R.1, Complaint ¶¶ 1-2)

ERISA must control this case, as it controls every action to recover welfare benefits. The Sixth Circuit failed to follow the statute, and prior pronouncements of this Court. It committed several errors of law when it expressly refused to apply ERISA principles, applied an "inference" that health benefits vest on retirement unless the

employer proves otherwise, and allowed that "inference" to interpolate a vesting provision that does not actually appear in the benefit plan documents. That "inference," and the decisions below, conflict with prior decisions of this Court and of other United States Courts of Appeals.

b. This Court recently, and unanimously, pronounced the rule that should have controlled this case:

> . . . ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. See *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 947 (CA6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"). Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91, 103 S. Ct. 2890, 2896-2897, 77 L.Ed.2d. 490 (1983). Accordingly, that Curtiss-Wright amended its plan to deprive respondents of health benefits is not a cognizable complaint under ERISA; the only cognizable claim is that the company did not do so in a permissible manner.

Curtiss-Wright Corp. v. Schoonejongen, 115 S. Ct. 1223, 1228 (1995).

Like this case, *Curtiss-Wright* involved a modification of retiree health benefits.[2] The Third Circuit had held that *Curtiss-Wright* unquestionably had the right to modify its

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[2] ERISA divides benefits plans into two classes: pension benefit plans and welfare benefit plans, which include the health benefit plan at issue in this case. ERISA § 3(1), (2), 29 U.S.C. § 1002(1), (2).

welfare plan, but that the amendment procedure was not stated specifically enough. *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), *rev'd*, 115 S. Ct. 1223 (1995). This Court agreed with the first holding, but reversed the second. 115 S. Ct. at 1228-29. The presumed right to amend a welfare benefit plan is *statutory*, not a term of a particular plan, and need not be explicitly reserved in the plan documents. *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1442 (1995); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993); *Deibler v. UFCW Local 23*, 973 F.2d 206, 210 (3d Cir. 1992) (severance pay).

In this case, and in several earlier decisions, the United States Court of Appeals for the Sixth Circuit has applied an "inference" directly contrary to the presumption this Court recognized in *Curtiss-Wright*: an "inference" that health benefits of union-represented employees vest upon retirement, regardless what the terms of the collective bargaining agreement actually provide. That Court first described the "inference" as follows:

> Finally, examination of the context in which these benefits arose demonstrates the likelihood that continuing insurance benefits for retirees were intended. Benefits for retirees are only permissive not mandatory subjects of collective bargaining. *Pittsburgh Plate Glass Co., supra*, 404 U.S. at 181-82, 92 S.Ct. at 398-99. As such, it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations. *See, e.g., Cadillac Malleable Iron supra*, slip op. at 12-13; *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio 405, 171 N.E.2d 518 (1960); *Roxbury Carpet, supra*, 73-2 Lab. Arb. Awards ¶ 8521, p. 4940. The employees are presumably aware that the union owes no obligation

> to bargain for continued benefits for retirees. If they forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements. Contrary to Yard-Man's assertions, the finding of an intent to create interminable rights to retiree insurance benefits in the absence of explicit language, is not, in any discernible way, inconsistent with federal labor law.
>
> Further, retiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree. This is not to say that retiree insurance benefits are necessarily interminable by their nature. Nor does any federal labor policy identified to this Court presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent. Rather, as part of the context from which the collective bargaining agreement arose, the nature of such benefits simply provides another inference of intent. Standing alone, this factor would be insufficient to find an intent to create interminable benefits. In the present case, however, this contextual factor buttresses the already sufficient evidence of such intent in the language of this agreement itself.

UAW v. Yard-Man, Inc., 716 F.2d at 1482. That "inference" has often been abused in the Sixth Circuit to justify a finding of vested benefits that has no support in the text of plan documents, as occurred in this case.

c. The Court of Appeals justified its departure from *Curtiss-Wright* and other ERISA principles by observing

that this case involves collective bargaining and the LMRA, and *Curtiss-Wright* did not. (Pet. App. 10a).

But ERISA does apply to collectively-bargained benefit plans. ERISA applies to every "employee benefit plan" established or maintained by (1) an "employer engaged in commerce or in any industry or activity affecting commerce," (2) a labor organization, or (3) "by both." ERISA § 4(a), 29 U.S.C. § 1003(a). ERISA defines the term "industry or activity affecting commerce" to "include[ ] any activity 'affecting commerce' within the meaning of the Labor Management Relations Act." ERISA § 3(12), 29 U.S.C. § 1002(12). By definition ERISA, its remedies and limitations, apply to a benefit plan established by collective bargaining, *i.e.*, "by both" under ERISA § 4(a)(3).

Nothing in ERISA, or in the LMRA, or in *Curtiss-Wright*, suggests that collectively-bargained welfare benefit plans are exempt from ERISA or from the *Curtiss-Wright* rule.

ERISA, a "comprehensive and reticulated" statute, regulates the entire field of employee benefits and employee benefit plans, and governs any claim of entitlement to benefits. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, 523 (1981). As a general matter of statutory construction, specific statutes prevail over general, and new statutes prevail over old. ERISA (1974) is newer than the LMRA (1947) and ERISA is far more specific. To the extent that they conflict, ERISA must prevail over a more general labor-relations statute such as the LMRA. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-76 (1990) (ERISA's specific anti-alienation provision, § 206(d)(1), 29 U.S.C. § 1056(d)(1), controls over general remedial provision in § 501(b) of Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 501(b));

Pension Benefit Guar. Corp. v. Alloytek, Inc., 924 F.2d 620, 626 (6th Cir. 1991) (specific provision of ERISA prevails over general procedural provision of Fed. R. Civ. P. 13(a)).

Of course, here there is no conflict between ERISA and LMRA. LMRA § 301(a) may provide jurisdiction, but jurisdiction is all it provides. The LMRA does not prescribe standards for the regulation and interpretation of benefit plans. ERISA does. The LMRA does not prescribe remedies for the enforcement of benefit plans. ERISA spells out the remedies available in exacting, "comprehensive and reticulated" detail, to the exclusion of any remedy not listed. ERISA § 502(a), 29 U.S.C. § 1132(a); *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 113 S. Ct. 2063, 2066 (1993).

The conflict rather is between ERISA and its federalized law of trusts, and the "common law" derived from *Yard-Man*. Plaintiffs have argued below that ERISA § 514(d), 29 U.S.C. § 1144(d), saves LMRA common law (the *Yard-Man* inference) from being displaced by ERISA. But that argument is wrong both as a matter of statutory construction, and as a matter of precedent. First, ERISA preempts all State law, and defines "State law"—but not "law"—to include judicial "decisions . . . having the effect of law, of any State," *i.e.*, common law. ERISA § 514(a), (c)(1), 29 U.S.C. § 1144(a), (c)(1). ERISA saves from preemption "any law of the United States . . . or any rule or regulation issued under any such law." ERISA § 514(d). The word "decision" is conspicuously absent. Thus, by its express terms, ERISA § 514(d) saves only previously-existing federal legislation from its preemptive embrace. *Bonin v. American Airlines, Inc.*, 621 F.2d 635, 638 (5th Cir. 1980). It does *not* preserve inconsistent federal common law.

Second, ERISA was enacted and took effect on September 2, 1974. It didn't go to sleep for 20 years, like Rip Van Winkle, only to wake up in 1994 and try to unlace 20 years of common law. ERISA came before *Yard-Man*, before the Sixth Circuit developed this "common law" on modification of retiree health benefits. ERISA must be a cornerstone of the federal common law under LMRA § 301, in cases involving collectively-bargained welfare plans, and courts must recognize its provisions and policies in fashioning that common law. *UAW v. Park Ohio Indus.*, 687 F. Supp. 338, 341 (N.D. Ohio 1987), *aff'd in part, rev'd in part*, 876 F.2d 894 (6th Cir. 1989). ERISA and the principles of trust law federalized by ERISA apply, under ERISA, to benefit plans that are the product of collective bargaining. *Central States, Southeast and Southwest Areas Pension Fund v. Central Trans., Inc.*, 472 U.S. 559, 570 (1985) (involved both pension and welfare plans); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-34 (1981).

The Sixth Circuit's own case law illustrates the anomalous nature of the *Yard-Man* "inference". In cases that involve retiree health benefits but not collective bargaining, the Sixth Circuit has applied the *Curtiss-Wright* rule that an employer normally can modify a welfare benefit plan. *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993); *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993); *Gill v. Moco Thermal Indus., Inc.*, 981 F.2d 858 (6th Cir. 1992); *Adams*, 905 F.2d at 947 (*cited by Curtiss-Wright*, 115 S. Ct. at 1228); *Musto v. American Gen. Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989).

Further, in cases that involve collective bargaining agreements but not retiree health benefits, the Sixth Circuit

frequently applies ERISA principles to the interpretation of those CBAs. *United Steelworkers of Am. v. United Engineering, Inc.*, 52 F.3d 1386, 1395-96 (6th Cir. 1995); *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1389 (6th Cir.), *cert. denied*, 115 S. Ct. 193 (1994) (analyzes whether welfare benefit "vested" under CBA by reference to ERISA, and to cases applying ERISA to non-union retirees and employees); *United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 196-97 (6th Cir. 1988) (LMRA § 301 and ERISA provide concurrent jurisdiction to enforce benefit plans; analyzes substantive obligations under ERISA); *Central States Southeast and Southwest Areas Pension Fund v. Central Trans. Inc.*, 698 F.2d 802, 809-813 (6th Cir. 1983) (CBAs interpreted in light of ERISA), *rev'd other grounds*, 472 U.S. 559 (1985) (Supreme Court agreed with this principle, 472 U.S. at 570); *United Steelworkers of Am. v. North Bend Terminal Co.*, 752 F.2d 256 (6th Cir. 1985) (brought under both LMRA § 301 and ERISA § 502; employer's obligations analyzed under ERISA).

d. In this case, the Sixth Circuit held expressly that welfare benefits can vest upon retirement, even if the plan document does not provide for vesting under any circumstances. (Pet. App. 11a) That is a necessary consequence of the *Yard-Man* "inference." But that holding conflicts with this Court's pronouncements in *Curtiss-Wright* and other cases.

ERISA's statute of frauds, ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), requires that:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument.

This statute of frauds applies to welfare plans, and is a "core functional requirement" of ERISA. *Curtiss-Wright*, 115 S. Ct. at 1230. A "written plan is to be required in order

that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright*, 115 S.Ct. at 1230, (*quoting with emphasis added*, H.R. Rep. No. 93-1280, p. 297, *reprinted in* 1974 U.S. Code Cong. & Admin.News pp. 4639, 5077, 5078). A CBA or benefit plan may provide vested rights that survive termination of the employment relationship or contract. *But*, any such agreement must be included in the written terms of the contract or benefit plan. *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). The written terms of a benefit plan document may not be modified or superseded by oral statements, or informal written communications such as letters. *Musto*, 861 F.2d at 910.

e. The Sixth Circuit's application of *Yard-Man* further conflicts with this Court's decision in *Litton Fin. Printing Div'n v. NLRB*, 501 U.S. 190 (1991), which rejects the notion that an obligation to continue a benefit plan or other entitlement "normally" survives CBA expiration.

The interpretation and enforcement of collective bargaining agreements is governed by substantive federal law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). In fashioning federal common law under the LMRA, the courts should apply traditional principles of contract law that are consistent with federal labor policy. *Id.* at 457; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548 (1964). At common law, when a contract does not include an express durational provision, it is construed as terminable at will, not as continuing forever. *Murphy v. Keystone Wire & Steel Co.*, 61 F.3d 560, 567 (7th Cir. 1995) (federal common law applied to benefit plan); *All Line, Inc. v. Rabar Corp.*, 919 F.2d 475, 479 (7th Cir. 1990) (contract under Illinois law); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766

F.2d 1007, 1012 (7th Cir. 1985) (Illinois law); *Moorehouse v. Boeing Co.*, 501 F. Supp. 390, 395 (E.D. Pa.), *aff'd mem.*, 639 F.2d 774 (3d Cir. 1980) (Pennsylvania law); *Miller v. Wikel Mfg. Co.*, 545 N.E.2d 76, 79 (Ohio 1989).

And the common-law rule applies to collective bargaining agreements too. A CBA with no fixed expiration date is terminable at will, rather than *in*terminable. National Labor Relations Act § 8(d)(1), 29 U.S.C. § 158(d)(1); *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 715 (11th Cir. 1987); *Communications Workers v. Southwestern Bell Tel. Co.*, 713 F.2d 1118, 1123 n.4 (5th Cir. 1983); *In re United Mine Workers of Am. Employer Benefit Plans Litigation*, 782 F. Supp. 658, 669 (D. D.C. 1992), *aff'd sub nom., United Mine Workers v. Pittston Co.*, 984 F.2d 469 (D.C. Cir), *cert. denied*, 113 S. Ct. 3039 (1993); *Boeing Airplane Co. v. NLRB*, 174 F.2d 988, 991 (D.C. Cir. 1949); *Trustees of Atlanta Iron Workers Local 387 Pension Fund v. Southern Stress Wire Corp.*, 509 F. Supp. 1097, 1105 n.12 (N.D. Ga. 1981); *Eastern Dist. Council of United Bhd. of Carpenters v. Blake Const. Co.*, 457 F. Supp. 825, 830 (E.D. Va. 1978).[3]

At common law, a contract is not construed as providing a perpetual right unless the contract clearly states that is the intent of the parties. *William B. Tanner Co. v. Sparta-Tomah Broadcasting Co.*, 716 F.2d 1155, 1159 (7th

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[3] *Accord New York News Inc. v. Newspaper Guild*, 927 F.2d 82, 84 (2d Cir. 1991) (contract that continues to fixed expiration date, then indefinitely thereafter, may be terminated at will, and 15 days' notice is reasonable); *United Trans. Union v. Grand Trunk Western R. Co.*, 712 F. Supp. 107, 109 (E.D. Mich. 1989) (Zatkoff, J.) (contract under Railway Labor Act has no fixed expiration date and notice of modification may be given at any time), *aff'd*, 901 F.2d 489 (6th Cir.), *cert. denied*, 498 U.S. 815 (1990). This is also the rule at common law.

Cir. 1983) (Wisconsin law); *Town of Readsboro v. Hoosac Tunnel & W. R. Co.*, 6 F.2d 733, 735 (2d Cir. 1925) (Learned Hand, J.) (pre-*Erie* case arising in Vermont, applying national common law, relying on Massachusetts and Sixth Circuit precedents); *United States Surgical Corp. v. Oregon Medical & Surgical Specialties, Inc.*, 497 F. Supp. 68, 71 (S.D.N.Y. 1980) (New York law); *Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc.*, 178 F. Supp. 655, 661 & n.5 (S.D.N.Y. 1959), *aff'd*, 280 F.2d 197 (2d Cir. 1960) (New York and Missouri law follow same rule); *Shannon v. Civil Service Empl. Ins. Union*, 337 P.2d 136, 138 (Cal. App. 1959).

In *Litton*, this Court applied the common law rule—no perpetual obligation unless the contract expressly says so. The Court held that:

> As with the obligation to make pension contributions in *Advanced Lightweight Concrete Co.*, other contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And, of course, if a collective bargaining agreement provides *in explicit terms that* certain *benefits continue after the agreement's expiration*, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions.

501 U.S. at 207-08 (emphasis added).

f. The injunction covers only retirees and surviving spouses from the Heintz, SPECO, and Gunite plants, which CBAs all expired by 1990. The district courts therefore have no jurisdiction under LMRA § 301 to entertain suits to enforce those agreements. *Litton*, 501 U.S. at 206. Once

again the application of the *Yard-Man* "inference," or any LMRA concept contrary to ERISA, conflicts with *Litton*.[4]

First, the Insurance Supplemental Agreements were for a fixed term. The benefits it provided expired with it. *Litton*, 501 U.S. at 206-07; *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606-07, 617 (7th Cir.) (*en banc*), *cert. denied*, 114 S. Ct. 291 (1993); *Yard-Man*, 716 F.2d at 1481 n.6; *Upholsterers' Int'l Union, Local No. 307 v. American Pad*, 372 F.2d 427, 428 & n.3 (6th Cir. 1967). The termination provision in this case is both specific to health benefits, and explicit: the agreement "terminates." Second, there was no provision for vesting or lifetime duration. Nothing in the Insurance Supplemental Agreements provided that health coverage would be provided for the lifetime of the retiree or extend beyond the expiration of the agreement, or that health benefits vested upon retirement, or that a retiree would become eligible for a particular health benefit upon retirement.

The Sixth Circuit's decision also conflicts with *Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548-49 (1988). This Court there held that the contractual obligation to make contributions to a multi-employer welfare benefit plan expired with the collective agreement, so the district court lacked subject matter jurisdiction under either LMRA or ERISA to enforce the expired agreement. That case is on point: the

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[4] In *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20 (1971), this Court stated that a retiree would have standing under LMRA § 301 to sue to enforce a right vested under a collective bargaining agreement. But now that Congress has directly provided a cause of action under ERISA § 502(a)(1)(B), with specified procedures and remedies, the implied cause of action under LMRA § 301 "disappears." *United Engineering*, 52 F.3d at 1394.

obligation Plaintiffs are trying to impose on Kelsey-Hayes, and one of the primary contract provisions upon which they rely, is Article I, Section 3 of the Insurance Supplemental Agreements, which required the Company to "*contribute* the full premium or subscription change for Health Care" for retirees. (C-Pet. App. 3a, 4a, 7a)

g. The Sixth Circuit's errors are not isolated to this case, but have been serious and sustained since *Yard-Man* was decided. In some decisions, the Sixth Circuit flatly has stated that retiree benefits "normally" or presumptively vest. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 692 (6th Cir. 1985); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616-17 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986). In others, the Court purports to hold that retiree status gives rise to no presumption, but still affirms a decision in which the lower court explicitly had applied a presumption and placed the burden of proof improperly upon the employer to disprove vesting. *UAW v. Cadillac Malleable Iron Co.*, 113 L.R.R.M. (BNA) 2525 (W.D. Mi. 1982), *aff'd*, 728 F.2d 807 (6th Cir. 1984). No matter how the Court parses the *Yard-Man* standard, the long history of decisions is one of *Yard-Man* cited, vesting of benefits found, and judgment entered in favor of union retirees. *Smith v. ABS Indus., Inc.*, 890 F.2d 841 (6th Cir. 1989); *Policy*, 770 F.2d 609; *Weimer*, 773 F.2d 669.

In the Sixth Circuit, a panel decision has *stare decisis* effect, and must be followed until it is overruled by the Court sitting *en banc* or by a decision of the Supreme Court. *Salmi v. Secretary of Health and Human Serv.*, 774 F.2d 685, 689 (6th Cir. 1985). In this case, the Sixth Circuit has both (1) denied a suggestion for hearing *en banc*, in order to consider over-ruling *Yard-Man*; and (2) held in the panel decision that *Curtiss-Wright*, *Litton*, and *Ad-*

vanced Lightweight Concrete have not overruled *Yard-Man*. (Pet. App. 10a-12a)

The Sixth Circuit plans to persist in this error. Only this Court can correct it.

II.

THE DECISION IN THIS CASE CONFLICTS WITH DECISIONS OF AT LEAST THE FIFTH, SEVENTH AND EIGHTH CIRCUITS.

a. No other Circuit Court has adopted the *Yard-Man* "inference". All put the burden of proof on retirees, and require express textual evidence of an intent to vest benefits.[5]

Three Circuits have rejected the *Yard-Man* "inference" by name, in critical language: the Fifth, Seventh and Eighth. *United Paperworkers v. Champion Int'l Corp.*, 908 F.2d 1252, 1261 n.12 (5th Cir. 1990) (expressly rejecting *Yard-Man* approach); *Bidlack*, 993 F.2d at 606-608;[6] *John Morrell & Co. v. UFCW*, 37 F.3d 1302, 1304 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2251 (1995); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th

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[5] The other Circuits also apply ERISA in union-retiree cases. *John Morrell*, 37 F.3d at 1304; *Gable*, 35 F.3d at 855; *Williams v. Caterpillar, Inc.*, 944 F.2d 658, 661-62 (9th Cir. 1991).

[6] *Bidlack* was decided *en banc*, with the court split 3-3-4. Judge Posner's lead opinion and the plurality dissent state the law of that Circuit where those two opinions agree—including on vesting. *Central States, Southeast and Southwest Areas Pension Fund v. Joe McClelland, Inc.*, 23 F.3d 1256, 1259 (7th Cir. 1994); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1187 (7th Cir. 1994). In *Bidlack* those two opinions, to which a majority of the court subscribed, adopted a rebuttable no-vesting default rule. 993 F.2d at 606-08, 619.

Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989) (expressly rejecting *Yard-Man* "inference").

The Third, Fourth, and Ninth Circuits have largely ignored it, and put the burden of proof on the plaintiff to prove a vested right based on plan language. *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 330-31 (3d Cir. 1984); *Gable*, 35 F.3d at 855; *Williams*, 944 F.2d at 666-67.

Although several Circuits have cited *Yard-Man* for the uncontroversial principle that courts apply contract principles in construing labor agreements, that does not signal agreement with the "inference." The First and Ninth Circuits, in the mid-1980s, cited *Yard-Man* in preliminary injunction appeals. *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987); *Bower v. Bank Hill, Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984). The First Circuit never came back to this issue, but the Ninth Circuit has adopted the better view: no inference. *Williams*, 944 F.2d at 666-67. The Fourth and Eleventh Circuits, reviewing the same labor contract, applied *Yard-Man's* specific holding—that specific durational language controls over general—but did not adopt the "inference" then or later. *Keffer v. K.H. Porter Co.*, 872 F.2d 60, 62 (4th Cir. 1989); *United Steelworkers of Am. v. Connors Steel Co.*, 855 F.2d 1499, 1504-05 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989).

Unless this Court accepts this Cross-Petition, *Yard-Man* will continue to engender confusion, not only in lower courts of the Sixth Circuit, but in district courts of circuits that have not specifically rejected the inference. *Webb v. GAF Corp.*, 1996 U.S. Dist. LEXIS 855 *14-18 (Jan. 24, 1996), *appeal dismissed*, 78 F.3d 53 (2d Cir. 1996); *United Steelworkers of Am. v. Newman-Crosby Steel, Inc.*, 822 F. Supp. 862, 867 (D. R.I. 1993). That confusion will result in the

improper entry of preliminary and then permanent injunctions against employers.

CONCLUSION

Cross-Petitioner KELSEY-HAYES COMPANY respectfully prays this Court to GRANT the Cross-Petition for a Writ of Certiorari, if it grants the Petition in No. 95-1674.

Respectfully submitted,

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Dated: May 17, 1996

APPENDIX A

No. 94-1463
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH GOLDEN, ET AL.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
	)	
v.	)	ORDER
	)	
	)	
KELSEY-HAYES COMPANY,	)	
	)	
Defendant-Appellant.	)	

The court having received a petition for hearing en banc, and the petition having been circulated to all active judges of this court, and no judge of this court having favored the suggestion,

It is ORDERED that the petition be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

[Dated February 1, 1996]

APPENDIX B

SPECO COLLECTIVE BARGAINING AGREEMENT AND INSURANCE SUPPLEMENT.

The last CBA at SPECO expired April 13, 1989. It provided:

ARTICLE XX

INSURANCE PROGRAM

Section 126. The parties have provided for an amended Insurance Plan by Supplemental Agreement.

The Amended Plan will provide for Life Insurance Benefits for all employees covered by this Agreement, Accidental Death and Dismemberment Insurance, Sickness and Accident Weekly Benefits, Extended Disability Benefits, Hospital, Medical, Surgical, Hearing, Vision, Dental and Prescription Drug Expense Benefits, and Transition and Bridge Benefits.

The Company will assume full cost for the Insurance Program.

ARTICLE XXI

GENERAL PROVISIONS

* * *

Section 140. All prior agreements either oral or written are hereby cancelled and this Agreement and the supplements attached hereto shall constitute the entire Agreement between the parties. All grievances settled during the term of previous agreements either oral or written shall be final in respect to such specific grievance. It is also agreed that any plant wide privileges previously enjoyed by employees and not covered by this contract will not be denied them because of signing this Agreement.

* * *

ARTICLE XXII
TERMINATION OF AGREEMENT

Section 145. This Agreement dated April 11, 1986 shall continue in full force and effect without change through 11:59 p.m. Thursday, April 13, 1989.

(R.6: Hess Aff't Ex. G at 65-66, 69, 70)

The Insurance Supplement to that last CBA provided:

INSURANCE SUPPLEMENT F

Section 1. Establishing of Program

The Company will establish an amended insurance program, hereinafter referred to as the "Program," a copy of which is attached hereto as Supplement F-1 and made a part of this Agreement to the extent applicable to the employees represented by the Union and covered by this Agreement as is fully set out herein, modified and supplemented, however, by the provisions hereinafter.

* * *

Section 10. Duration of Agreement

This Agreement and Program, as modified and supplemented by this Agreement shall continue in effect until the termination of the Collective Bargaining Agreement of which this is a part.

* * *

INSURANCE PROGRAM SUPPLEMENT F-1

ARTICLE I
Effective Date, Financing and Administration of Insurance Program

* * *

Section 3. Company Contributions and Administration

* * *

(b) Company Contributions for Health Care Coverages

* * *

(6) For Retired Employees and Certain Former Employees

The Company shall contribute the full premium or subscription charge for Health Care (other than Dental or Vision) coverages continued in accordance with Article III, Section 5, for:

(i) A retired employee and his eligible dependents, if any, provided such retired employee is eligible for benefits under Article II of the Kelsey-Hayes Hourly-Rate Bargaining Unit Employees Pension Plan.

(ii) An employee and his eligible dependents, if any, terminating at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Kelsey-Hayes Hourly-Rate Bargaining Unit Employees Pension Plan.

(7) For Surviving Spouses

(i) The company shall contribute the full premium or subscription charge for Health Care (other than Dental or Vision) Coverages continued in accordance with Article III, Section 6 on behalf of a surviving spouse as defined in Article III, Section 6 and the eligible dependents of any such spouse, provided, however that the contributions on behalf of a surviving spouse for the month the surviving spouse becomes age 65 and subsequent months shall be made only for months that the surviving spouse has the voluntary coverage that is available under the Federal Social Security Act by making contributions.

* * *

ARTICLE III
HEALTH CARE BENEFITS

* * *

Section 5. Continuance of Health Care Coverage Upon Retirement or Termination of Employment at Age 65 or Older

(a) Health Care

Coverage (other than Dental and Vision) an employee has under this Article at the time of retirement or termination of employment at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle the employee to a benefit under the SPECO Division of Kelsey-Hayes Company Pension Plan for Hourly-Rate Employees shall be continued by the Company.

* * *

Section 6. Continuance of Health Care Coverage for Surviving Spouse of an Employee or a Retired or Certain Former Employee

(a) The Company shall make suitable arrangements for a surviving spouse to participate in the Hospital and Medical Expense Prescription Drug and Hearing Aid (but not Dental and Vision) coverages, referred to in Article III as subject to the availability of the coverages:

* * *

(2) of a retired employee, (but not a former employee eligible for a deferred pension) if such spouse is receiving a benefit under a survivor benefit option under Article II, Section 6-f, of the SPECO Division of Kelsey-Hayes Company Pension Plan,

(3) of former employee whose employment was terminated at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle the former employee to a benefit

under Article II of the SPECO Division of the Kelsey-Hayes Company Pension Plan,

* * *

(R.6: Hess Aff't Ex. H at F1, F6, F8, F10, F12, F43-F44)

HEINTZ COLLECTIVE BARGAINING AGREEMENTS AND INSURANCE SUPPLEMENT.

The last CBA at Heintz expired July 12, 1990. It provided:

ARTICLE XVI

PENSION PLAN, INSURANCE PROGRAM AND SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN

The parties have provided for a Pension Plan, an Insurance Program, and a Supplemental Unemployment Benefit Plan by Supplemental Agreements signed by the parties simultaneously with the execution of this Agreement, which Supplemental Agreements are published under a separate cover as Supplementals "A," "B" and "C", respectively, and made part of this Agreement as if set out in full herein, subject to all provisions of this Agreement.

* * *

ARTICLE XVIII
TERMINATION

Section 1. This Agreement dated July 9, 1987, shall continue in full force and effect without change through 11:59 P.M., July 12, 1990. If either party desires to terminate this Agreement as provided above, or to modify this Agreement as hereinafter provided, the Agreement shall continue in effect from year to year after July 12, 1990 subject to termination by either party on sixty (60) days written notice prior to July 12 of any subsequent year.

(R.6: Hess Aff't Ex. D at 62, 64)

The Insurance Supplement to the Heintz 1980 CBA provided:

SUPPLEMENT "B"
SUPPLEMENTAL AGREEMENT
(Insurance Program)

Section 1. Establishment of Program

The Company will establish an amended insurance program, hereinafter referred to as the "Program," a copy of which is attached hereto as Supplement B-1 and made a part of this Agreement to the extent applicable to the employees represented by the Union and covered by this Agreement as if fully set out herein, modified and supplemented, however, by the provisions hereinafter.

* * *

Section 11. Duration of Agreement

This Agreement and Program as modified and supplemented by this Agreement shall continue in effect until the termination of the Collective Bargaining Agreement of which this is a part.

* * *

SUPPLEMENT "B-1"
THE KELSEY-HAYES INSURANCE PROGRAM
FOR HOURLY-RATE AND SALARIED
EMPLOYES WITHIN A BARGAINING UNIT

* * *

Section 3. Company Contributions and Administration

* * *

(a)(6) For Retired Employes and Certain Former Employees—The Company shall contribute the full premium or subscription charge for Health Care (including Vision effective August 1, 1981) Coverages continued in accordance with Article III, Section 5, for:

(i) A retired employe and his eligible dependents, if any, provided such retired employee is eligible for benefits under Article II of the Kelsey-Hayes Hourly-

Rate and Salaried Employees within a Bargaining Unit Pension Plan and

(ii) An employe and his eligible dependents, if any, terminating at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Kelsey-Hayes Hourly-Rate and Salaried Employees within a Bargaining Unit Pension Plan.

(a)(7) For Surviving Spouses

(i) The Company shall contribute the full premium or subscription charge for Health Care (including Vision effective August 1, 1981) Coverages continued in accordance with Article III, Section 6(b) on behalf of a surviving spouse as defined in Article III, Section 6(b), (1), (2), (3), and (4) (including for this purpose a surviving spouse who would receive survivor benefits under the Kelsey-Hayes Hourly-Rate and Salaried Employes within a Bargaining Unit Pension Plan except for receipt of survivor income benefits under Article II of this Program), and the eligible dependents of any such spouse, provided, however, that the contributions on behalf of a surviving spouse for the month the surviving spouse becomes age 65 and subsequent months shall be made only for months that the surviving spouse has the voluntary coverage that is available under the Federal Social Security Act by making contributions.

* * *

ARTICLE III
HEALTH CARE BENEFITS

* * *

Section 5. Continuance of Health Care (other than Vision) Coverages upon Retirement or Termination of Employment at Age 65 or Older

(a) The Health Care (other than Vision prior to September 1, 1981) Coverages an employe has under this Article at the time of retirement or termination of

employment at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Kelsey-Hayes Hourly-Rate and Salaried Employes within a Bargaining Unit Pension Plan shall be continued thereafter provided that suitable arrangements for such continuation can be made with the carrier(s). Contributions for such coverages so continued shall be in accordance with Article I, Section 3(b)(7).

(b) An employe who upon retirement is not enrolled for the coverages, as provided in subsection (a) above may enroll for Health Care (including Vision effective September 1, 1981) Coverages to which he is entitled at the time of or subsequent to retirement, subject to approval of the carrier(s). Such coverages shall become effective on the first of the month following receipt of application from such retired employe.

Section 6. Continuance of Health Care (other than Vision) Coverages for Surviving Spouse of an Employe or a Retired or Certain Former Employe

* * *

(b) The Company shall make suitable arrangements for a surviving spouse:

(1) of an employe or retired employe, (but not a former employe eligible for a deferred pension) if such spouse is receiving or is eligible to receive a survivor benefit under Article II of the Kelsey-Hayes, Heintz Division, Hourly-Rate Employes and Salaried Employes within a Bargaining Unit Pension Plan,

(2) of a retired employe if, prior to his death, he was receiving a benefit under Article II of the Kelsey-Hayes, Heintz Division Hourly-Rate Employes and Salaried Employes within a Bargaining Unit Pension Plan,

(3) of a former employe whose employment was terminated at age 65 or older for any reason other than a discharge for cause with insufficient credited ser-

vice to entitle him to a benefit under Article II of the Kelsey-Hayes, Heintz Division Hourly-Rate Employes and Salaried Employes within a Bargaining Unit Pension Plan, or . . . .

(R.6: Hess Aff't Ex. E at 2, 14, 86-89)

GUNITE COLLECTIVE BARGAINING AGREEMENT

The last CBA at Gunite, dated April 26, 1983, contained the following provisions:

21.7 *Retirees Cost of Insurance*—The Company will pay the full cost of hospital and medical expense coverages of currently enrolled pensioners and their eligible dependents and future pensioners provided the pensioner is eligible for benefits under Gunite Pension Plan, Exhibit "C". Coverage will be continued for the surviving spouse of insured retirees provided they are enrolled in Medicare Part B (if eligible).

* * *

ARTICLE XXV
DURATION

25.1 All prior agreements either oral or written are hereby cancelled and this Agreement and supplements attached hereto shall constitute the entire agreement between the parties. However, this Agreement may, by mutual agreement, be amended or modified from time to time in writing, and such amendments or modifications shall become a part of this Agreement when attached to this Agreement and signed by the respective parties.

* * *

25.3 This Agreement shall be in full force and effect April 23, 1983, except as provided herein, as of the date of ratification, February 6, 1983, and shall remain in effect until April 23, 1986 (11:59

p.m.), and shall continue thereafter in full force and effect from year to year unless written notice of termination of this Agreement, is given by either party to the other, in writing, by registered or certified mail, on or before sixty (60) days prior to the termination date.

(R.6: Hess Aff't Ex. A at 61, 67-68)

APPENDIX C

LANGUAGE IN SUMMARY PLAN DESCRIPTIONS

A summary plan description ("SPD") for the Gunite plant issued in 1984 (dated in 1983) provided:

For Retired Employes

When you are retired and are receiving benefits under the Pension Plan (except deferred vested benefits), your life insurance (at a reduced level shown on page 26) and all of your Health Care Coverages are continued without cost to you.

* * *

Termination of Employment

If you terminate employment with Kelsey-Hayes at age 65 or older for any reason other than discharge for cause, all of your Health Care coverages will be continued for the rest of your life without cost to you.

Kelsey-Hayes also pays the full cost of Health Care coverages for surviving spouses and eligible children of deceased pensioners and of employes who die after they are eligible to retire voluntarily under the Kelsey-Hayes Pension Plan.

A surviving spouse age 65 or older who is eligible but not enrolled for Medicare Part B coverage is not eligible for Kelsey-Hayes payment for any Health Care Coverages.

(R.6: Hess Aff't Ex. C at 43-44)

* * *

A SPD describing benefits provided Heintz hourly employees under the 1977 CBA and Insurance Supplement contained the following statements:

When you are retired, your life insurance and all of your Health Care coverages, except for vision, are continued without cost to you. In addition, survivor income benefit insurance is provided to age 65 for employes receiving total and permanent disability benefits under the Pension Plan. However, A.D.&D. insurance is not continued after you reach age 65 if retired under a total and permanent disability retirement.

If you terminate employment with Kelsey-Hayes at age 65 or older for any reason other than discharge for cause, all of your Health Care coverages, except vision care, will be continued for the rest of your life without cost to you.

Kelsey-Hayes also pays the full cost of Health Care coverages, except vision care, for surviving spouses and eligible children of deceased pensioners and of employes who die after they are eligible to retire voluntarily under the Kelsey-Hayes Pension Plan.

A surviving spouse age 65 or older who is not enrolled for Medicare Part B coverage is not eligible for Kelsey-Hayes payment for any Health Care coverages.

(R.6: Hess Aff't Ex. F at 40)

The SPECO SPD is similar to the 1984 Gunite SPD, including the restriction of the "rest of your life at no cost to you" language to persons who terminated employment at age 65 or after. (R. 21)

Supreme Court, U.S.
FILED
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No. 95-1884

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KELSEY HAYES COMPANY,
Cross-Petitioner,
v.

JOSEPH GOLDEN, ANGELO DEITOS, EDWARD JONES, LUTHER PALMER, CAROLINE FORYS, JOSEPHINE THOMAS, ARTHUR SALLIS, THELMA SONGER, JOHN W. GALLOWAY and ROGER FARRAR, on behalf of themselves and a class of persons similarly situated,
Cross-Respondents.

On Cross Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

In an action arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, should a preliminary injunction be upheld when the plaintiff-retirees have demonstrated the requisite "likelihood of success on the merits" of their claim that, applying traditional contract interpretation principles, the labor contracts at issue obligated the defendant-employer to provide medical benefits throughout the retirees' retirement?

PARTIES BELOW

Cross-Petitioner Kelsey-Hayes Company is a Defendant in the District Court. It was an Appellant in the Court of Appeals. It was also a Respondent in the Petition for Writ of Mandamus in the Court of Appeals. It is a Respondent to the Petition for Writ of Certiorari in Case No. 95-1674 before this Court.

Cross-Respondents Joseph Golden, Angelo Deitos, Edward Jones, Luther Palmer, Carolyn Forys, Josephine Thomas, Arthur Sallis, Thelma Songer, John W. Galloway, and Roger Farrar are Plaintiffs in the District Court. They were Appellees in the Court of Appeals. They were also Petitioners for a Writ of Mandamus in the Court of Appeals and are Petitioners for a Writ of Certiorari in this Court, Case No. 95-1674. John Hoyle, who was a Plaintiff in the District Court, died after this action was filed. He was replaced by Stephen Santangelo who is not a Cross-Respondent here. Ida Thomason was a Plaintiff in the District Court. She was dismissed without prejudice by the District Court and is not a Cross-Respondent here.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1884

KELSEY HAYES COMPANY,
Cross-Petitioner,

v.

JOSEPH GOLDEN, ANGELO DEITOS, EDWARD JONES, LUTHER PALMER, CAROLINE FORYS, JOSEPHINE THOMAS, ARTHUR SALLIS, THELMA SONGER, JOHN W. GALLOWAY and ROGER FARRAR, on behalf of themselves and a class of persons similarly situated,
Cross-Respondents.

On Cross Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE CASE

Cross-Respondents are a class of retired former employees and surviving spouses of retired employees of the Cross-Petitioner Kelsey-Hayes Company.[1] During their

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[1] In the decision below, the Sixth Circuit addressed two issues. *First*, the court affirmed the district court's decision that the plaintiff retirees were not entitled to a jury trial on their claim under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. That decision is the subject of a Petition for Writ of Certiorari filed by the retirees, Case No. 95-1674. *Second*, the Sixth Circuit

employment at Kelsey-Hayes, Cross-Respondents were represented by the International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), and their terms and conditions of employment were governed by a series of collective bargaining agreements negotiated by the UAW and Kelsey-Hayes. The Class is composed of hourly retirees from five separate Kelsey-Hayes facilities, along with surviving spouses and eligible dependents.

Since the 1960's, the collective bargaining agreements obligated Kelsey-Hayes to provide continued medical benefits to retired former employees. Although the language in the labor agreements from the five facilities varies to some extent, in each case that language links the Company's obligation to eligibility for pension benefits. For example, the agreement covering the SPECO facility provides that "[t]he Company shall contribute the full premium . . . for Health Care . . . for . . . [a] retired employee and his eligible dependents, if any, provided such retired employee is eligible for benefits under [the pension plan]." (Cross-Pet. App. 4a). The agreement covering the Gunite facility provided that "[t]he Company will pay the full cost of hospital and medical expense coverages of currently enrolled pensioners and their eligible dependents and future pensioners provided the pensioner is eligible for benefits under Gunite Pension Plan." (Cross-Pet. App. 10a).

Summary Plan Descriptions prepared and distributed by Kelsey-Hayes to employees and retirees contained the following language:

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affirmed the District Court's grant of a preliminary injunction to the retirees, requiring Kelsey-Hayes to continue the medical benefits at issue during the litigation. Kelsey-Hayes has filed a conditional Cross-Petition on that question, Case No. 95-1884. This Brief in Opposition addresses only Kelsey-Hayes' Cross-Petition.

The decision of the Sixth Circuit, dealing with both issues, is contained in the Appendix to the Petition for Writ of Certiorari filed in Case No. 95-1674 (hereafter Pet. App.).

> When you are retired and are receiving benefits under the Pension Plan . . . all of your Health Care Coverages are continued without cost to you.
>
> Kelsey-Hayes also pays the full cost of Health Care coverages for surviving spouses and eligible children of deceased pensioners . . . . (Cross-Pet. App. 12a).

The Summary Plan Descriptions also make special provisions for individuals who retire at age 65 or older without sufficient service to receive a pension benefit. In those circumstances, there is no lifetime pension benefit to which to link the receipt of continuing medical coverage. As to those persons, the SPD's state explicitly that "all of your Health Care coverages . . . will be continued for the rest of your life without cost to you." (Cross-Pet. App. 13a).

The labor agreements also contain general durational language, requiring re-negotiation every three years. (Cross-Pet. App. 3a). That language does not make any reference to the rights of individuals who have already retired, or to Kelsey-Hayes' obligations to those individuals.

When Kelsey-Hayes sold three of the five facilities in 1987, it agreed to retain resposibility for the retiree medical benefits for those individuals who had already retired from those facilities. (Pet. App. 14a, 60a). In order to support that liability, Kelsey-Hayes posted a $20 million multi-year letter of credit to the purchaser of two of the facilities who assumed the labor agreements. (*Id.*). Kelsey-Hayes continued to provide retirees with medical benefits for the next six years, until it implemented the modifications challenged here. (Pet. App. 62a).

In April of 1993, Kelsey-Hayes announced to its retires that, effective January 1, 1994, their medical benefits would be reduced in several significant ways. First, retirees would be required to make monthly contributions —over $80 per month per person in some cases—in order to continue to receive their coverage. Second, co-pays

and deductibles would be imposed, which in the aggregate could cost each family as much as an additional $4,000 per year depending on utilization. (Pet. App. 54a). Third, a new "lifetime cap" on benefits was added. Fourth, Kelsey-Hayes would no longer reimburse the retirees for part of the cost of the monthly Medicare Part B premium.

Kelsey-Hayes did not bargain with the UAW over these intended changes, or obtain the consent of the UAW or the retirees before announcing or implementing them.

Following the announcement of these intended changes, the present lawsuit was filed on November 12, 1993 by a group of named Plaintiffs on behalf of the class of affected Kelsey-Hayes retirees and surviving spouses whose right to benefits flowed from the collective bargaining agreements negotiated by the UAW and Kelsey-Hayes. The action was brought under § 301(a) of the Labor Management Relations Act of 1947, which provides for "suits for violation of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). A parallel count under § 502(a)(1)(B) of ERISA was included. That section of ERISA provides for suits by participants in employee benefit plans "to recover benefits due" or to "enforce . . . rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

On December 23, 1993, the retirees filed a motion for preliminary injunction. The benefit reduction went into effect, as announced, on January 1, 1994. Following a hearing held on March 10, 1994, the district court granted the retirees' motion for preliminary injunction.[2]

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[2] The injunction covered class members at the three sold facilities. The other two facilities are still owned by Kelsey-Hayes and Hayes Wheels International, Inc. In February, 1994, prior to the hearing on the preliminary injunction, these two companies agreed, during negotiations with the UAW, to reinstate most of the benefits without prejudice to the parties' positions in this action. (Pet. App. 4a).

After reviewing the allegations of the parties in detail, the district court summarized its findings on the contract interpretation question as follows:

> each of the collective bargaining agreements provides that eligibility for retiree health benefits is tied to eligibility for lifetime pension benefits or survivor spouse income. The summary plan descriptions indicate that retiree benefits were intended to last for the life of the retiree, without cost, regardless of the termination of the collective bargaining agreement. Defendant's conduct also indicates that plaintiffs' benefits were vested. After defendant sold its three divisions, it continued for six year to pay the full cost of retiree health benefits. Combined, all of these facts indicate that plaintiffs' retiree health benefits were intended to last for their lifetimes without modification. (Pet. 62a).

The district court therefore found that the retirees had demonstrated the requisite "likelihood of success on the merits" on their claim that the contracts at issue did not permit unilateral modification of the retiree medical benefits. Finding that all of the other necessary factors for preliminary injunctive relief were also present, the district court granted the retirees' motion for preliminary injunction.

Following Kelsey-Hayes' appeal, the Sixth Circuit reviewed the decision of the district court and concluded that the district court had not abused its discretion in granting preliminary injunctive relief. On the question of "likelihood of success on the merits," the Sixth Circuit first dealt with the language of the labor contracts themselves tying eligibility for medical benefits to eligibility for life-time pension benefits:

> The district court cites provisions in each of the [collective bargaining agreements] at issue which tie retiree and surviving spouse eligibility for health in-

> surance coverage to eligibility for vested pension benefits. Since retirees are eligible to receive pension benefits for life, the court found that the parties intended that the company provide lifetime health benefits as well. (Pet. App. 13a).

The Sixth Circuit also found that the district court's reading of the labor agreement language was supported by language from the Summary Plan Description, which specifically stated that medical benefits for certain retirees were "lifetime" benefits:

> The district court also notes language from the summary plan descriptions (SPD's) . . . which indicates that the company guarantees health benefits. A provision of one SPD provides that those employees who retire *without* pension eligibility because they have not been with the company long enough to participate in the pension plan will, nonetheless, have *lifetime* health coverage at no cost. The defendants argue that because the SPD's specifically provide lifetime health insurance benefits for these retirees only, such benefits were not intended for any other retirees.
>
> The plaintiffs argue the contrary. They assert that this specific language was necessary because these retirees do not have lifetime pension benefits to which to tie eligibility for health coverage, as do all the other retirees. The plaintiffs contend that the parties included this specific language to assure that those retirees who are ineligible for pension benefits still receive lifetime health care coverage. We find plaintiffs' argument more persuasive; it would be anomalous for the defendant to guarantee lifetime health coverage to retirees with only a couple of years of service while neglecting to provide equal benefits to pensioners with dozens of years of service. (Pet. App. 13a-14a). (emphasis in original.)

Finally, the Sixth Circuit agreed with the district court that Kelsey-Hayes' conduct following the 1987 sale of the divisions was inconsistent with Kelsey-Hayes' current ar-

gument that the benefits are subject to termination at any time. (Pet. App. 14a).

In short, the Sixth Circuit interpreted the disputed contractual provisions and agreed that the retirees were likely to succeed on their claim that the intent of the parties to the labor agreements was to provide for benefits during the retirees' entire retirement, rather than leave those benefits to the whim of the Company.

Neither the district court nor the Sixth Circuit has yet reached a final decision on this contract interpretation question. Each decided only that the retirees had demonstrated the requisite "likelihood of success on the merits" to warrant issuance of a preliminary injunction maintaining the benefits during the litigation. Discovery continues and the case has not yet been scheduled for trial.

REASONS FOR DENYING THE WRIT

The issue here can simply be stated: did Kelsey-Hayes, through its collective bargaining agreements with the UAW, agree to provide medical coverage to its UAW-represented retirees throughout their retirement. It is beyond dispute that, if Kelsey-Hayes did so obligate itself, the retirees are permitted to enforce that contractual obligation under both § 301 of the LMRA and § 502(a)(1)(B) of ERISA.

The question presented below, and raised in the Cross-Petition, is the extremely fact-intensive inquiry into whether Kelsey-Hayes in fact did so obligate itself. This question is nothing more than a routine, albeit factually-complicated, exercise in contract interpretation. Since the contracts at issue cover several separate facilities, were first negotiated more than 30 years ago, have been periodically re-negotiated since that time, and have been the subject of literally thousands of communications between Kelsey-Hayes and its employees and retirees, the inquiry will necessarily require the sifting of a great deal of evidence in order to determine the intent of the parties.

At this stage, neither the district court nor the Sixth Circuit has made a final determination on this question of contract interpretation. Instead, all that has occurred to date is that the district court has granted the retirees a preliminary injunction based on its determination that the retirees are likely to succeed on the merits of this contract interpretation question. The Sixth Circuit found that the district court did not abuse its discretion in granting that preliminary injunction. But this decision is, of course, preliminary. The parties have since engaged in extensive discovery. To date, over 30 depositions have been taken, and over 7500 documents have been produced. No trial date has been set. No final determination as to the meaning of the contract has been made by either the district court or the Sixth Circuit.

The Sixth Circuit did not depart from established precedent, or engender any conflict among the lower courts, when it applied traditional contract interpretation rules to address the question of whether the retirees here are "likely" to succeed on the contract interpretation question that will ultimately be posed in this case. Given that no final decision interpreting the contract has been rendered, this case is particularly unworthy of review in its current posture.

I. THE SIXTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR THE DECISIONS OF ANY OTHER CIRCUIT.

1. The court below engaged in nothing more than a garden-variety exercise in contract interpretation. The court examined the language of the contract, the conduct of the parties, and other evidence of intent and concluded that the retirees had demonstrated the requisite "likelihood of success on the merits" on the question of whether the intent of the parties was to obligate Kelsey-Hayes to continue to provide medical benefits to retirees throughout their retirement years.

Kelsey-Hayes' Cross-Petition is, in its entirety, based on a fundamental misunderstanding of the nature of the Sixth Circuit's decision. In its strained effort to manufacture a division of authority on this question, Kelsey-Hayes attributes to the Sixth Circuit an analysis that it did not adopt: that a commitment to provide lifetime medical benefits may be "inferred . . . based solely on the plaintiffs' 'status' as retirees, and not on any term of the benefit plan documents." (Cross-Pet. 8) Based on this misunderstanding, Kelsey-Hayes accuses the Sixth Circuit of holding that "ERISA principles do not apply to this case" and "disregard[ing] controlling Supreme Court precedent." (Cross-Pet. 8).

Of course, the Sixth Circuit did nothing of the sort. The Sixth Circuit did not hold that contractual silence results in interminable benefits. Nor did the Sixth Circuit shift the burden of proof to Kelsey-Hayes. Instead, the Sixth Circuit merely applied traditional contract interpretation rules and examined the relevant contract language, as well as the conduct of the parties and representations made by Kelsey-Hayes to the retirees. Based on this evidence—and not on any "inference" or other burden-shifting device—the Sixth Circuit concluded that the retirees were "likely" to succeed in proving at trial that Kelsey-Hayes had entered into a contract to provide retirees with medical benefits throughout their retirement years.

The quotidian nature of the Sixth Circuit's decision is best demonstrated—and the Cross-Petitioner's claims about that decision are best refuted—by reviewing the text of the Sixth Circuit decision. Thus, the Sixth Circuit explicitly held that applicable precedent "does not shift the burden of proof to the employer, nor does it require specific anti-vesting language before a court can find that the parties did not intend benefits to vest." (Pet. App. 12a). In accord with every other decision to address this issue, the Sixth Circuit framed its analysis by putting the burden of proof squarely on the retirees, and

requiring that the retirees show, through "basic rules of contract construction," that the agreements at issue obligated Kelsey-Hayes to provide the benefits for the duration of retirement. (Pet. App. 8a). As the Sixth Circuit stated,

> [t]o prove this, the plaintiffs must show that the defendant and the union intended to include a right to lifetime benefits when they negotiated the [collective bargaining agreements] at issue here. There is no statutory right to lifetime health benefits. If such a right exists, it exists because the parties agreed "to vest a welfare benefit plan." (Pet. App. 7a) (quoting *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1993) (footnote omitted).

The Sixth Circuit also noted that "whether benefits survive the termination of a CBA depends on the intent of the parties" (Pet. App. 8a). And the court below specifically endorsed that the Sixth Circuit's earlier holding in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), that

> "retiree benefits are [not] necessarily interminable by their nature. Nor does any federal labor policy . . . presumptively favor the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent." (Pet. App. 9a) (quoting *UAW v. Yard-Man, Inc.*, 716 F.2d at 1482).

Cross-Petitioner is thus simply wrong when it claims that the court below "inferred that health benefits vest on retirement based solely on the plaintiffs' status as retirees." (Cross-Pet. 8). As the decision itself makes clear, the Sixth Circuit "inferred" no such thing.

In short, the Sixth Circuit applied hornbook contract law principles to the contract interpretation question posed here. Cross-Petitioner lost the motion on the facts, not on the law. And there is no reason why this Court should review the factual determinations of the lower court, particularly in view of the fact that those factual determinations are, at this stage, only preliminary.

2. It is a bit difficult to understand what Cross-Petitioner is getting at when it accuses the Sixth Circuit of holding that "ERISA principles do not apply to this case." (Cross-Pet. 8). The court below did not express anything even resembling this statement.

To be sure, ERISA does not *require* the vesting of retiree health benefits. But neither does ERISA *prohibit* contractual commitments to provide medical benefits for any particular duration. As this court stated in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985), "[ERISA] does not regulate the substantive content of welfare-benefit plans." In short, ERISA leaves that question to the parties.[3]

Cross-Petitioner apparently believes that ERISA's neutrality on this subject should form a shield that employers can use when their employees or retirees seek to enforce contractual promises. But the fact that ERISA does not mandate any particular duration—and instead leaves that decision to the parties—does not throw a cross light on efforts by retirees to enforce the promises that have been made. Contracting systems, after all, are not about copy-

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[3] Cross-Petitioner argues that ERISA supplants § 301 of the Labor Management Relations Act when welfare benefits are involved and that federal policy under ERISA rather than federal policy under the LMRA controls. Of course, because ERISA does not regulate the substance of welfare benefit plans, it is difficult to determine what that policy would be, if not federal labor policy developed under § 301. Every circuit which has specifically addressed the specific issue has relied on § 301 as the source of the applicable federal common law. *Stewart v. KHD Deutz of America Corp.*, 75 F.3d 1522, 1526 (11th Cir. 1996); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 604 (7th Cir.), *cert. denied*, 114 S.Ct. 291 (1993); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991); *Paperworkers v. Champion International Corp.*, 908 F.2d 1252, 1255-56 (5th Cir. 1990); *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60, 62 (4th Cir. 1989). There is no conflict in the Courts of Appeal on this or any other issue relevant to the decision of the court below.

ing rights and obligations already established by public law. Instead, the purpose of contracts is to establish rights and obligations on matters that are *not* settled by public law.

When an employer promises its employees that, upon their retirement, they will continue to receive medical coverage for the duration of their retirement, that employer is entering into a contract which is not mandated by ERISA. But nothing about ERISA suggests that retirees should be precluded from enforcing that promise. And when the parties disagree about whether such a promise was made, nothing in ERISA creates additional hurdles for the retirees to clear in their effort to show that such a promise was extended. Instead, as all circuits have recognized, ordinary contract principles will guide the courts in determining the terms of the applicable contract.

For example, as the Eighth Circuit held, ERISA "allows the parties to determine the duration of the welfare benefits. Thus, the issue is 'simply one of contract interpretation.'" *Anderson v. Alpha Portland Industies, Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989) (quoting Local 105-A, *Food & Commercial Workers v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985). And, as the Eleventh Circuit succinctly put it, "[b]ecause federal labor policy neither favors nor disfavors the vesting of retirees' health benefits . . . we apply traditional rules of contractual interpretation." *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (11th Cir. 1993) (citations omitted).

Cross-Respondents have not found a single case that supports Cross-Petitioner's suggestion that ERISA's neutrality on the question of contractual commitments to maintain welfare benefit plans for a specific duration somehow poisons the well when retirees seek to enforce these contractual promises. Instead, the circuits have had

no difficult in unanimously concluding that traditional contract principles govern the resolution of these disputes.

3. Cross-Petitioner also asserts that the decision below conflicts with three prior decisions of this Court. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991), *Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988), and *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223 (1995). Cross-Petitioner is entirely incorrect.

In *Litton* the Court stated:

> [C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. *Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement.* And of course, if a collective bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement . . . 501 U.S. at 207-08 (emphasis added)

Litton thus makes plain that "[e]xceptions" to the general rule—i.e. situations where contractual obligations will survive termination of the agreement that creates them—"are determined by contract interpretation." *Id.* In other words, if a court determines that the parties intended a particular obligation to extend beyond the termination of the agreement, that intent will be given effect. In addition, the Court made clear that "[r]ights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement." *Id.*

This is precisely the analysis followed by the Sixth Circuit, and by every other court to address the question of retiree health benefits. The court below recognized that there is both a general rule that obligations do not ordinarily survive the expiration of a collective bargaining

agreement, and an exception for "accrued or vested" rights, which "as a general matter" do outlive the agreement. The task for the district court here was to determine whether the benefits at issue were subject to the general rule or to the exception. As the Sixth Circuit recognized, resolving that question by reference to traditional methods of contract interpretation is precisely what *Litton* requires. (Pet. App. 11a). *Accord Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607-08 (7th Cir.) (en banc), *cert. denied*, 114 S.Ct. 291 (1993) (citing *Litton* in support of resort to rules of contract interpretation to determine duration of promise to provide retiree medical benefits). And that is what the district court will do in this case when the time comes for a final determination on the meaning of the contracts at issue.

In *Advanced Lightweight*, the issue before the Court had nothing to do with a claim of continued *contractual* obligations. Instead, the pension plan trustees there were attempting to enforce a *statutory* duty, derived from the duty to bargain under the National Labor Relations Act. 484 U.S. at 542-43. In holding that the trustees did not have the statutory authority to enforce that statutory obligation, the Court did not address whether a company may enter into a *contract* which create obligations that survive that contract's expiration. As the Sixth Circuit recognized, *Advanced Lightweight* says nothing about the issues in this case. (Pet. App. 12a).

Finally, the Court's decision is *Schoonejongen* does not conflict with the decision below. In *Schoonejongen*, no claim was even advanced that the employer, through contract or otherwise, had promised benefits for any particular duration. Instead, the lower courts had already determined that no such promise had been made. That determination was not challenged before this Court. 115 S.Ct. at 1227.

The question in *Schoonejongen*, instead, was whether the *procedure* for making amendments to the benefit

plans complied with Section 402(b)(3) of ERISA, which establishes certain minimal requirements for such procedures. 115 S.Ct. at 1226. In reaching the conclusion that the procedure at issue there complied with ERISA, the Court merely re-affirmed the basic principle that, absent evidence of commitments to the contrary, an employer generally has the right to modify or terminate its employee medical benefit plans. Nowhere in the decision, however, does *Schoonejongen* even suggest that ERISA permits an employer to disregard its contractual commitments to its retirees, or that ERISA puts a thumb on the scales in the employer's favor when the scope of an employer's contractual commitments is in dispute. Instead, *Schoonejongen* merely confirms the basic premise—which is not in dispute here—that an employer who does *not* make a commitment to continue a benefit plan in effect for any particular duration is not required by ERISA to continue that plan for any specific duration.

But, of course, that observation merely *raises* the question of contract interpretation at issue here: whether the employer in fact obligated itself to provide medical benefits to retirees throughout their retirement years, or whether it retained the right to terminate those benefis at will. The lower courts have unanimously concluded that that question must be answered by applying traditional principles of contract interpretation. Nothing in *Schoonejongen* undermines that conclusion in the slightest.

4. Cross-Petitioner argues that the decision below is in conflict with the decisions of three other circuits. Again, Cross-Respondents argument is based entirely on a fundamental misunderstanding of the reasoning of the court below. As demonstrated, the court below did not rely on any "presumption" or "inference" of lifetime benefits in order to reach its conclusion. Instead, the court merely engaged in a garden-variety exercise in contract interpretation, keeping the burden of proof at all times on the party seeking to establish the existence of the promise

(i.e. the retirees). This approach has been universally endorsed by the courts of appeals to address the question, including the cases cited by Cross-Petitioner. None of the five cases cited by Cross-Petitioners conflicts in any way with the legal approach taken by the Sixth Circuit in the present case.

In *Paperworkers v. Champion International Corp.*, 908 F.2d 1252 (5th Cir. 1990) the Fifth Circuit endorsed traditional contract interpretation principles to resolve questions such as that presented here. The court, in fact, reviewed a number of decisions by other court of appeals, including the Sixth Circuit's decision in *UAW v. Yard-Man* and noted that "[i]n each case the court looked to the specific agreement in question to discern whether there was an intent to confer lifetime health insurance benefits on the covered retirees." 908 F.2d at 1261. The court agreed with this approach adopted by other courts, and remanded the case to the district court "to determine whether there was an intent to vest the benefits with each retiree . . . ." *Id.* Nothing about this approach is contrary to the decision below, or to the decision of any other circuit.[4]

The Eighth Circuit cases of *John Morrell & Co. v. Food and Commercial Workers*, 37 F.3d 1302 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2251 (1995), and *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989), are equally unhelpful to Cross-Petitioner's cause here.

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[4] In a footnote, the Fifth Circuit also noted that it disagreed with *Yard-Man* "[t]o the extent that" *Yard-Man* mandated a burden-shifting "inference" or "presumption" of lifetime benefits. 908 F.2d at 1261 n.12. Of course, neither *Yard-Man* nor the decision below in fact indulges in any such burden-shifting device. Instead, as both the *Champion* court and the court below held, the contract interpretation question posed by these cases is answered by applying traditional principles of contract construction to "determine whether there was an intent to vest the benefits." 908 F.2d at 1261.

In *Alpha Portland*, in fact, the Eighth Circuit understood that the Sixth Circuit "in *Yard-Man* recognized that no federal labor policy presumptively favors vesting" and that "[b]ecause Congress has taken a neutral position on this issue," the issue is "simply one of contract interpretation." 836 F.2d at 1517 (quoting *Local 105-A, Food & Commercial Workers v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985)). In fact, the Eighth Circuit pointed out in *Alpha Portland* that the Sixth Circuit has expressly disavowed any intent to engage in burden-shifting when "[s]hortly after *Yard-Man* was decided . . . the Sixth Circuit stated that 'there is no legal presumption based on the status of retired employees.'" 836 F.2d at 1516 (quoting *UAW v. Cadillac Malleable Iron Co., Inc.*, 728 F.2d 807, 808 (6th Cir. 1984).

In *Morrell*, the Eighth Circuit noted that the "case turns on whether vested health benefits were contractually conferred in the [labor agreements]. The Union has the burden of proof on this issue." 37 F.3d at 1304. There is, of course, nothing at all controversial about this proposition.

Finally, Judge Posner's decision in the Seventh Circuit's *en banc* decision in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir.), *cert. denied*, 114 S.Ct. 291 (1993) agrees entirely with the analysis adopted by the court below as well as every circuit to address the question: retirees bear the burden of establishing a contractual commitment in accordance with traditional principles of contract construction. 993 F.2d at 607-09. The only reference to *Yard-Man* in Judge Posner's opinion is a favorable reference in support of the proposition that ERISA "does not forbid . . . vesting [of retiree medical benefits] by a written contract which could be part of a collective bargaining agreement." 993 F.2d at 605. This does not exhibit any conflict with the decision below.

Given this unanimity of opinion in the lower courts on the basic legal principles applicable to these cases—as well as the intensely factual nature of these inquiries—it is not at all surprising that the Court has denied *certiorari* at least 13 times in recent years in cases presenting the question of whether an employer had made a commitment to continue retiree medical benefits for any particular duration. *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1442 (1995); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied*, 114 S.Ct. 196 (1993); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir.), *cert. denied*, 114 S.Ct. 291 (1993); *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986); *Adams v. Avondale Industries, Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *Jensen v. SIPCO, Inc.*, 38 F.2d 945 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1428 (1995); *John Morrell & Co. v. Food and Commercial Workers*, 37 F.3d 1302 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2251 (1995); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *Alday v. Container Corp.*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989). In each of these cases, the lower courts simply applied traditional rules of contract interpretation in order to resolve a dispute regarding the intended duration of retiree medical benefits. Because the decision below adheres to rather than departs from these established principles, there is no cause or necessity for review by the Court.

In short, every case to examine the question—including those cited by Cross-Petitioner—has reached the same conclusion: traditional rules of contract interpretation will be used to determine the scope of an employer's promise regarding the duration of retiree medical benefits. Given this unanimity of approach, there is no reason for review by this Court, particularly in view of the fact that the court below has not even rendered a final decision on the meaning of the contract language at issue here.

II. THE PRELIMINARY INJUNCTION DECISION BY THE COURT BELOW IS AN INTERLOCUTORY DECISION, AND THEREFORE PARTICULARLY INAPPROPRIATE FOR REVIEW.

As already noted, the court below has not reached a final decision on the contract interpretation question presented by this case. Instead, it has thus far only reviewed the necessarily truncated presentation of evidence that was possible in connection with the retirees' motion for preliminary injunction, filed barely six weeks after the Complaint was filed. Based on that presentation of the evidence available to the retirees at that time, the court below concluded that the retirees had demonstrated the requisite "likelihood of probability of sucsess on the merits." But that finding is only preliminary.

The parties have conducted extensive discovery since the preliminary injunction hearing. That discovery includes more than 30 depositions and over 7500 separate documents to date. That evidence was not available at the preliminary injunction hearing, and has yet to be reviewed by the court below.

The decision by the court below is, at this stage, therefore entirely interlocutory. Following the close of discovery, a final determination will be made as to the meaning of the disputed provisions of the contract. There is no reason for this Court to intercede on a question of contract

interpretation before the district court has even rendered a final decision on that question.[5]

The Court has long disfavored the grant of *certiorari* with respect to interlocutory decisions. *American Construction Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) (*certiorari* should be granted as to interlocutory decisions only in "extraordinary" cases); *Locomotive Firemen v. Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967).

This case, in fact, demonstrates plainly the wisdom of this rule. If the Court were to accept review now, it would be required to decide the case on a record developed over the course of only six weeks, and would be deprived of the benefit of the extensive additional discovery that has occurred since then. More importantly, the Court would be reviewing only a preliminary determination that one party is "likely" to prevail on the merits. And that determination, by its terms, will govern the parties only until a final decision on the merits of the case can be rendered. There is simply no reason for the Court to review a case in this posture.

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[5] The jury trial question is presented in the retirees' Petition for Writ of Certiorari in Case No. 95-1674 does not suffer from the same defect. The question there is whether the issue will be tried to a jury or to the district judge in the upcoming trial. That question is purely legal; there is no need to await the gathering of additional evidence, or the district court's contract interpretation decision. Instead, on the jury trial question, both the district court and the Sixth Circuit have rendered final decisions and there is no reason to delay review of that important constitutional question in this Court.

CONCLUSION

For the foregoing reasons, the cross-petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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